



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

January 19, 2007

MEMORANDUM FOR: DOD CHIEF FOIA PUBLIC LIAISONS

SUBJECT: Executive Order (EO) 13329 & the Use of Contractors in FOIA Administration

Reference: Department of Defense Freedom of Information Act (FOIA) Improvement Plan for Executive Order 13392, Improving Agency Disclosure of Information, June 14, 2006

Office of Management and Budget (OMB) Circular A-76, Rev. (May 29, 2006)

DoD Instruction Number 1100.22, September 6, 2006

The Department of Defense's (DoD) agency-wide Plan addressing FOIA improvements in accordance with Executive Order (EO) 13392 sets forth milestones and timetables associated with agency goals. In Objective 3 of the DoD Plan the goal is to establish standards for identifying which FOIA functions are "inherently governmental activities," and therefore, activities that cannot be contracted out, and to provide agency-wide guidance on the relationship of Circular A-76 competitions and FOIA functions.

In accordance with the DoD Plan, the Defense Freedom of Information Policy Office (DFOIPO) adopts the following standards for the use of contractors in FOIA administration:

1. An inherently governmental activity is "an activity that is so intimately related to the public interest as to mandate performance by governmental personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government." Inherently governmental activities fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements." OMB Circ. No. A-76, Rev. (May 29, 2003).

2. Inherently governmental activities include, among other things, "activities that require either the exercise of discretion when applying Federal Government authority or value judgments when making decisions for the Federal Government. . . . These functions cannot be legally contracted and shall be designated for DoD civilian or military performance." DoD Instruction Number 1100.22 § 4.1.

3. The development and clarification of policy “to include DoD decisions regarding responses to Freedom of Information Act (FOIA) requests and administrative appeals of denials of FOIA requests” is an inherently governmental activity. Contractors may assist government officials “with routine responses that, because of statute, regulation, or agency policy, do not require the exercise of any judgment in determining whether documents are to be released or withheld.” DoD Instruction Number 1100.22 § E2.4.2.9.

4. Oversight and control of government operations can only be performed by government personnel. “The degree of government involvement and expertise necessary to keep sufficient oversight and control of government operations will vary by function and situation” depending on the following factors: “approval authority, complexity of operation, geographic dispersion of the activity, regulatory authority, and consequence of default.” DoD Instruction Number 1100.22 § E3.3.

5. The following factors should be considered before relinquishing governmental control and authority over inherently governmental functions to contractors where there is insufficient public accountability and transparency:

A. Contractor advisory assistance: There is a need for informed, independent judgment by government officials, who should not be “unduly influenced or controlled by private contractors who are beyond management controls otherwise applicable to public employees and who might not have objectives in concert with the public’s best interests.” DoD Instruction Number 1100.22 § E3.3.1

- ensure that a contractor’s involvement on a project is “not so extensive or so far advanced that the government does not have the ability (sufficient time, information, or resources) to develop and consider options other than those provided by the contractor.” DoD Instruction Number 1100.22 § E3.3.1.1.2;

- “ensure that contractors do not have undue influence in the final decision” to include determining “which, and how, options or recommendations are provided to Defense officials for a final decision, or why an option is recommended to the deciding official as the government’s preferred alternative.” DoD Instruction Number 1100.22 §§ E3.3.1.1.3.1 & E3.3.1.1.3.2

B. Government contracting responsibility: Government personnel alone “should be responsible for the final review, revision, or comment on plans

and recommendations developed by a private sector contractor or by joint public-private teams.” DoD Instruction Number 1100.22 § E3.3.1.2.

-government officials shall determine if there are a sufficient number of knowledgeable and experienced government employees available to maintain sufficient oversight and understanding of the project to determine whether the contractor has met the terms of the contract and provided a complete and objective product, and review and revise the contractor’s recommendations to the extent necessary to ensure the decision expresses the DoD’s views, conforms with DoD policy, complies with the law, and supports public interests; or provides an alternative point of view or recommendation to the deciding official. DoD Instruction Number 1100.22 §§ E3.3.1.2.1 & E3.3.1.2.2

C. Contract support services: Contractors may provide service support if both of “the required level of performance or quality of service is specified in the contract in quantifiable and measurable terms and is not left to the discretion of the contractor,” and “the DoD holds discretionary authority for final approval of the product or service through a government review or test.” DoD Instruction Number 1100.22 §§ E3.3.2.1 & E3.3.2.1.2.

-“[s]upport services shall not be contracted if oversight, supervisory control, and performance of the function are non-severable because extensive discretionary decision-making is involved.” DoD Instruction Number 1100.22 § E3.3.2.2.

D. Risk Assessment

-DoD components shall conduct risk assessments to verify if the Defense official, in the administration of the contract, would have to: (1) regularly address policy issues not covered, or not adequately covered, by DoD Directive, Instruction, Regulation, or other formally approved document; (2) regularly or routinely provide guidance on procedural matters of a discretionary nature because the DoD does not have established practices or procedures or a clear vision for how to accomplish the work; (3) regularly change how the service is performed to match evolving law, policy, doctrine, or tactics because the situation is so fluid that revisions are required on a recurring basis; (4) supervise and control daily activities of the contractor as opposed to reviewing and testing the final product; (5) retain the right to add or remove

employees from the project for other than security or misconduct reasons as opposed to specifying performance standards because the activity is too complicated to specify how and what should be accomplished or ranges of acceptable actions; and, (6) intervene in operations involving individuals from foreign nations or other Federal agencies who are not governed by the same laws, treaties, Executive Orders, rules, regulations or policies as DoD personnel to mediate policy or procedural differences or prevent other parties from usurping DoD authority. DoD Instruction Number 1100.22 § E3.3.2.2 et seq.

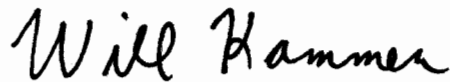
E. Discretionary decisions: Not all discretionary decision-making is considered an inherently governmental activity. For a decision to be inherently governmental “it must have the effect of committing the government to a course of action when two or more alternative courses of action exist and have significant consequence to the DoD.” DoD Instruction Number 1100.22 § E3.3.2.3.

-DoD officials are responsible for reviewing projects to determine the risks and consequences to contracting the service, which involves the DoD official determining “if the way the function is performed would result in inappropriate contract relationship (e.g., personal services) or inappropriately affect assignment of liability, and determine if the consequences of the discretionary decision making (to include possible unintended consequences) is of sufficient significance to the DoD to warrant government control and, therefore, should not be contracted.” DoD Instruction Number 1100.22 §§ E3.3.2.3.1 & E3.3.2.3.2.

F. Confer with authorities: DoD components “shall confer with manpower authorities before contracting for support services to verify whether the work is required for readiness or management needs of the DoD.” When assessing the merits of contracting functions, manpower authorities will “assess whether it would require more manpower to develop the statement of work, award and execute the contract, and assess the quality of the final product or service, than it would take to perform the service in-house.” DoD Instruction Number 1100.22 §§ E3.3.2.4 & E3.4.

6. DFOIPO has identified the following FOIA functions as inherently governmental activities that must be performed by DoD personnel:

1. Making final determinations regarding whether to treat incoming correspondence as a FOIA or Privacy Act request;
2. Making final determination of requests for expedited processing;
3. Determining the appropriate fee category in which to place requesters;
4. Deciding requests for fee waivers;
5. Deciding any issues regarding the scope or interpretation of the request;
6. Determining the appropriateness of claimed exemptions;
7. Approving the approach taken in negotiations/discussions with the requester;
8. Deciding administrative appeals;
9. Conducting final review of all outgoing correspondence, memoranda, and release packages;
10. Drafting court documents for filing in FOIA lawsuits in which the government's legal strategy and affirmative defenses are determined;
11. Formulating and/or approving FOIA policies and procedures;
12. Conducting FOIA training if it involves issues of DoD policy.



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